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PROVISIONAL ESTIMATES OF THE STAFFING, STRUCTURE AND COSTS OF THE ESTABLISHMENT AND OPERATION OF AN INTERNATIONAL CRIMINAL COURT

Preliminary report of the Secretary-General

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INTRODUCTION

1. In paragraph 5 of its resolution 49/53, adopted on 9 December 1994, the General Assembly requested the Secretary-General to submit to the Ad Hoc Committee on the Establishment of an International Criminal Court a preliminary report with provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court. The present preliminary report has been prepared in response to that request.

2. Paragraph 5 of resolution 49/53 contains a general reference to "an international criminal court" and makes no mention of the proposals of the International Law Commission in this respect. An international criminal court could of course be designed, staffed, structured and financed in a variety of ways. Bearing in mind the terms of resolution 49/53 as a whole, the Secretary-General has taken as a basis for the preparation of the present report the draft statute prepared by the International Law Commission which provides helpful, if limited, guidance on the structure and staffing of the contemplated court.

3. Based on the above, the present report consists of three sections. Section I discusses the general premises underlying the draft statute prepared by the International Law Commission which would have a bearing on the functioning and financing of the proposed court. Section II describes the organizational and financial arrangements envisaged by the said draft for each of the organs of the proposed court. Section III addresses the question of the costs of the establishment and operation of the proposed court.

I. GENERAL PREMISES UNDERLYING THE DRAFT STATUTE PREPARED BY THE INTERNATIONAL LAW COMMISSION WHICH ARE RELEVANT TO THE FUNCTIONING AND FINANCING OF THE PROPOSED COURT

4. The general nature and characteristics of the international criminal court envisaged by the International Law Commission reflect the basic approach which the Commission adopted in 1992 in the light of the report of the Working Group established to consider issues relating to such a court or other trial mechanism. 1/ The fundamental premises underlying the draft statute that would have a bearing on the functioning and financing of the proposed court relate to the nature of the court, its jurisdiction and the relationship between the court and the United Nations.

1/ See the report of the International Law Commission on the work of its forty-fourth session (hereinafter "the 1992 report") (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), paras. 98, 104 and annex, para. 396).

A. Nature of the proposed court

5. Under article 4, paragraph 1, of the draft statute, the court is envisaged as a permanent institution that would be established by treaty and operate only when required to consider a particular case, and not as a full-time body. The statute would be the constituent instrument of an existing legal mechanism that would be available when needed, rather than a mere draft or proposal that would have to be agreed upon before the institution could operate. Although some members viewed a full-time court as offering better guarantees of independence and impartiality, the Commission considered it more realistic to envisage a non-standing permanent body, at least in the initial phase of the court's existence, without excluding the possibility of the court remaining permanently in session if its caseload so required. This approach was considered to be consistent with the goals of flexibility and cost-efficiency endorsed by the Commission in 1992. 2/

6. The court would be essentially a facility available only to States parties to its statute, and, in certain situations, to the Security Council. While some members favoured permitting any State, as well as the Prosecutor, to initiate proceedings before the court to increase the likelihood of prosecution, the Commission felt that the more restrictive approach which ultimately prevailed would encourage States to accept the rights and obligations provided for in the draft statute, to share the financial burden relating to the operating costs of the court and to provide the cooperation necessary for an effective prosecution. Resort to the court by States parties is addressed in articles 21 and 22 of the draft which lay down the consent requirements and in article 25 which provides that a complaint shall as far as possible be accompanied by supporting documentation to avoid the substantial costs associated with the investigation and prosecution of a case in response to a frivolous, groundless or politically motivated complaint. 3/ Furthermore, pursuant to article 23, paragraph 1, the Security Council would, as an alternative to the establishment of an ad hoc tribunal under Chapter VII of the Charter of the United Nations, be allowed to refer situations to the court, as opposed to filing complaints against particular individuals. While some members favoured providing a similar role for the General Assembly, particularly in situations in which the rule of unanimity of the permanent members of the Security Council precluded action by the Council, other members felt that such a role would not be appropriate in view of the legal character of General Assembly resolutions. 4/

2/ See the 1992 report (ibid.), para. 104, and annex, para. 396 (iv) and (v), and the report of the International Law Commission on the work of its forty-sixth session (hereinafter "the 1994 report"), (ibid., Forty-ninth Session, Supplement No. 10), para. 49, and para. 91 (hereinafter, the "draft statute"), article 4, para. 1, and the commentary thereto.

3/ See the 1992 report, annex, para. 396, and the 1994 report, para. 64, and draft statute, articles 22 and 25 and the commentaries thereto.

4/ See the 1994 report, paras. 65-66, and draft statute, article 23 and the commentary thereto.

7. As indicated in the preamble proposed by the International Law Commission, the court would provide a complementary international criminal justice system to enhance the effective prosecution and suppression of crimes of international concern by national criminal justice systems. The court is intended to operate in cases where there is no prospect of persons accused of such crimes being duly tried in national courts rather than to exclude existing national-court jurisdiction or to interfere with international judicial cooperation under existing agreements, including extradition. 5/ Pursuant to article 21 of the draft, the court would exercise jurisdiction only with the consent of the custodial State and the territorial State, with two limited exceptions concerning genocide or Security Council referrals under articles 21 and 23, respectively. Pursuant to article 35, the court could decline to exercise its residual jurisdiction, either on its own motion or in response to an application by the accused or a request by an interested State, with respect to minor crimes or crimes dealt with adequately by national authorities.

B. Jurisdiction of the proposed court

8. The court envisaged in the draft statute would be one with limited jurisdiction. The subject-matter jurisdiction of the court would, according to article 20, encompass four crimes under general international law (genocide, war crimes, crimes against humanity and aggression) and exceptionally serious crimes of international concern defined under or pursuant to the treaties listed in the annex to the draft statute. 6/ The personal jurisdiction would extend to natural persons (States and other entities being thus excluded) and proceedings would generally be conducted in the presence of the accused. 7/ The States parties could restrict the territorial or the temporal jurisdiction of the court by limiting their acceptance of jurisdiction to particular conduct or a particular period pursuant to article 22, paragraph 2. The court would have a duty to confirm that all jurisdictional requirements were met before proceeding with a case under article 24.

C. Relationship between the proposed court and the United Nations

9. The various means by which the court could be brought into relationship with the United Nations are considered in connection with the method for its establishment in appendix III to the draft statute. The Commission noted that

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5/ See the 1994 report, draft statute, the preamble and article 21, para. (2) and the commentary to those provisions.

6/ The Commission stated that "the inclusion of these four crimes represented a common core of agreement in the Commission, and is without prejudice to the identification and application of the concept of crimes under general international law for other purposes". Ibid., para. (3) of the commentary to article 20.

7/ Ibid., see article 37 and the commentary thereto.

the terms of this relationship would affect the financing and the administration of the court. Under article 2, the President would be authorized to conclude an agreement, with the approval of States parties to the statute, establishing an appropriate relationship between the United Nations and the court to enhance its universality, authority and effectiveness. While providing the procedure for establishing such a relationship, the Commission felt that the details would need to be addressed in the context of the overall willingness of States to proceed with the establishment of a court. 8/

II. ORGANIZATIONAL AND FINANCIAL ARRANGEMENTS ENVISAGED, FOR EACH OF THE ORGANS OF THE PROPOSED COURT, IN THE DRAFT STATUTE PREPARED BY THE INTERNATIONAL LAW COMMISSION

10. Article 6 of the draft statute sets at 18 the number of judges of the proposed court. In addition to sitting on the Trial, Appeals and other chambers (see paras. 16-20 below), and, in the case of the President and Vice-Presidents, performing the functions assigned under the draft statute to the Presidency (see para. 13 below), the judges would have to discharge the other functions listed in paragraph 33 below.

11. The judges would serve only when required to consider a particular case (article 9) unless the States parties decided that, in view of the workload of the court, judges should serve on a full-time basis.

12. Under article 5 of the draft statute, the court would consist of a Presidency, an Appeals Chamber, Trial Chambers and other chambers, a Procuracy and a Registry.

A. The Presidency

13. Under article 8 (3) of the draft statute, the President and the Vice-Presidents would constitute the Presidency which would be responsible for the due administration of the court and the other functions envisaged in the draft statute. Those functions include:

- Constituting the Appeals Chamber (article 9 (1));
- Nominating the judges to be members of the Trial Chamber (article 9 (5));
- Exercising some pre-trial and other procedural functions in case where a Chamber of the court is not seized of the matter (article 8 (4));
- Issuing subpoenas and warrants (article 26 (3));

8/ Ibid., see article 2 and para. 8 of the commentary thereto.

- Reviewing the Prosecutor's decision not to initiate an investigation or not to file an indictment (article 26 (5));

- Issuing warrants for the provisional arrest of the suspect (article 28 (1));

- Approving indictments requested by the Prosecutor (article 27);

- Dealing with the requests made regarding pre-trial detention or release (article 29 (2) and (3));

- Dealing with the manner of notification of the indictment (article 30 (3));

- Approving the terms and conditions on which persons may be made available to assist in prosecution (article 31 (3));

- Considering a request for revision of a conviction (article 50);

- Addressing the issues dealing with pardon, parole and commutation of sentences (article 60 (3)).

14. As indicated in paragraph (2) of the commentary to article 8, the Commission agreed that this provision would not prevent the President from becoming full-time if circumstances should so require. Some members of the Commission argued strongly that the court should have a full-time President who would reside at the seat of the court and be responsible under the draft statute for its judicial functioning. Others stressed the need for flexibility and the character of the court as a body which would only be convened as necessary: in their view, a requirement that the President serve on a full-time basis might unnecessarily restrict the range of candidates for the position.

15. Under article 17, the President is to receive an annual allowance, and the Vice-Presidents a special allowance for each day they exercise the functions of the President.

B. The Chambers

16. Article 9 of the draft statute provides that the Trial Chamber would consist of five judges and the Appeals Chamber of the President and six other judges.

17. The Trial Chamber would be responsible for the conduct of the trial and its functions would include the following:

- To decide on the question of challenges to the jurisdiction of the court (article 34);

- To decide on the issues of admissibility (article 35);

- To order that the trial proceed in the absence of the accused (article 37);

- To conduct the trial (article 38);

- To hold a further hearing, in the event of a conviction, to hear any evidence relevant to sentence and impose sentence (article 46);

- To conduct a retrial, if so ordered by the Appeals Chamber;

- To review a conviction, if so ordered by the Presidency (article 50 (3) (a) and (b)).

18. Under article 49 (1), the Appeals Chamber would have all the powers of the Trial Chamber. In addition, its functions would include the following:

- To reverse or amend the decision by the Trial Chamber or if necessary to order a new trial, if the appeal is brought by the convicted person (article 49 (2) (a));

- To order a new trial, if the appeal is brought by the Prosecutor against an acquittal (article 49 (2) (b));

- To vary the sentence if, in an appeal against sentence, the Chamber finds that the sentence is manifestly disproportionate to the crime (article 49 (3));

- To review a conviction, if so ordered by the Presidency (article 50 (3) (c)).

19. In accordance with articles 5, 9 and 37 of the draft statute, other chambers may be constituted.

20. Under article 17, the judges are to receive a daily allowance during the period in which they exercise their functions. Should the States parties decide by a two-thirds majority, under article 10, paragraph 4, that the workload of the court requires that judges should serve on a full-time basis, judges would be paid full-time salaries instead of an allowance.

C. The Procuracy

21. Under article 12 of the draft statute, the Procuracy would be headed by a Prosecutor who would be assisted by one or more Deputy Prosecutors and who may appoint such other qualified staff as may be required. The Procuracy would be entrusted with the performance of various functions in the investigation and prosecution of criminal cases, including:

- Reviewing the complaint or other information received and deciding whether to initiate an investigation (article 26 (1));

- Conducting the investigation in terms of questioning suspects, victims and witnesses; collecting documentary or other evidence; conducting on-site investigations; taking the necessary protection measures with respect to confidentiality of information or protection of persons; and seeking the cooperation of States or of the United Nations (article 26 (2));

- Preparing the indictment when the investigation provides a sufficient basis for proceeding with the prosecution of a case (article 26 (4));

- Preparing and presenting the prosecution's evidence at trial in accordance with the rules to be adopted;

- Providing information to assist in the determination of an appropriate sentence in the event of a conviction (article 46 (1));

- Appealing a judgement or sentence of a Trial Chamber to the Appeals Chamber or responding to an appeal filed by the defence (article 48);

- Applying for the review of a decision or responding to an application for review filed by the defence based on newly discovered evidence (article 50).

22. Paragraph 4 of article 12 of the draft statute allows the Prosecutor and Deputy Prosecutors to be elected on a stand-by basis and to serve as required, the underlying intention being to maintain the flexibility of the system of the draft statute while allowing for the full-time involvement of the Prosecutor in case of need.

23. The staff of the Procuracy would be subject to staff regulations drawn up by the Prosecutor.

D. The Registry

24. Under article 13 of the draft statute, the Registrar would be elected by the judges. The Registrar would be the principal administrative officer of the court and would be responsible for performing important functions envisaged for the Registry as a depositary of notifications and a channel for communications with States, including the following:

- Receiving declarations or withdrawals of acceptance of jurisdiction (article 22);

- Receiving indictments filed by the Prosecutor (article 27);

- Receiving payment of fines designated to defray the costs of the trial (article 47);

- Transmitting to States requests for cooperation and judicial assistance and warrants for arrest and transfer of the accused (articles 51 and 53);

- Receiving information provided by States parties concerning the competent national authorities (article 57).

25. A Deputy Registrar may be elected in the same manner as the Registrar.

26. The Registrar would hold office for a term of five years and would be available on a full-time basis. The Deputy Registrar may be elected on the basis that the Deputy Registrar is willing to serve as required.

27. The staff of the Registry would be subject to staff regulations drawn up by the Registrar.

III. QUESTION OF THE COSTS OF THE ESTABLISHMENT AND OPERATION OF THE PROPOSED COURT

28. Under the approach of the International Law Commission as outlined above, this question would arise in different terms at the various stages of development of the institution.

29. The first stage would be that of the adoption by States, in accordance with the scheme proposed by the Commission in appendix I to the draft statute, of a convention providing for the establishment of the facility envisaged by the Commission and to which the statute would be attached. Under the recommendation contained in paragraph 90 of the 1994 report of the Commission, such a convention would be concluded in the framework of an international conference of plenipotentiaries to be convened by the General Assembly. The formal establishment of the institution as a facility available to States parties would thus entail the costs pertaining to the convening of the international conference. Such costs would depend on the venue and duration of the conference, on its working methods and on the extent of the conference services required (précis-writing, interpretation, documentation, etc.).

30. The Secretariat would be in a position, on the basis of the experience of previous conferences of plenipotentiaries entrusted with the finalization of drafts originating in the International Law Commission, to make proposals on the procedural and organizational aspects of the convening of such a conference. Once approved, those proposals would provide the basis for precise estimates of the relevant costs. Bearing in mind, however, that under paragraph 2 of General Assembly resolution 49/53, the arrangements for the convening of an international conference of plenipotentiaries are to be considered by the Ad Hoc Committee in the light of its review of the major substantive and administrative issues arising out of the Commission's draft, the Secretary-General considers it premature to make proposals on the procedural and organizational aspects of the convening of the conference.

31. The second stage would be that of the entry into force of the convention referred to above, entailing the effective establishment of the facility envisaged by the International Law Commission. The Commission, abiding by its standard practice not to draft final clauses for its draft articles, has not made any specific recommendations as to the number of ratifications or accessions that should be required for the entry into force of the convention.

At the same time, it has expressed the view that, since the draft statute was intended to reflect and represent the interests of the international community as a whole in relation to the prosecution of the most serious crimes of international concern, the convention should require a substantial number of States parties before it enters into force. 9/

32. The entry into force of the convention would open the way for the process of election by the States parties of the judges, in accordance with article 6, and of the Prosecutor and Deputy Prosecutor, in accordance with article 12.

33. The judges, once elected, would have to discharge the following functions:

- Electing the President, the first and second Vice-Presidents and the alternate Vice-Presidents (article 8);

- Electing the Registrar and, as the case may be, the Deputy Registrar (article 13);

- Drafting the initial Rules of Court within six months of the elections and submitting them to a conference of States parties (article 19).

34. The performance of the functions referred to above would entail administrative and financial implications, as follows:

- Daily allowances for all judges (except the President who, under article 17, is entitled to an annual allowance);

- Travel by judges to and from the place of the meeting;

- Professional and secretarial support staff;

- Conference services (interpretation and translation from and into the two working languages of the court, etc.);

- Office supplies;

- Renting of premises in case the United Nations or other institutions could not provide the required meeting rooms and office space.

35. It is suggested that the daily allowances of judges might be calculated on the basis of the salary of the judges of the International Court of Justice and that the drafting of the initial Rules of the Court might extend over a period of three months and take place at United Nations Headquarters or in one of the regional offices of the United Nations. Should those suggestions commend themselves to the Ad Hoc Committee, the Secretary-General would be in a position to provide estimates of the relevant costs.

36. The International Law Commission envisaged two possibilities for the financing of such costs: direct financing by the States parties, or total or

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9/ See draft statute, appendix I, paras. 1 and 2.

partial financing by the United Nations. 10/ As indicated above, the method of financing selected for the court may depend, to some extent, on its relationship to the United Nations.

37. The third stage of development of the institution is the stage where the court would become operational as a result of a complaint from a State or the referral of a situation by the Security Council. The Commission suggested that it may be appropriate to envision different methods of financing depending on whether the court is called into operation as the result of a complaint filed by a State party or a referral by the Security Council.

38. At the stage under consideration, the various organs of the court would begin to perform the functions entrusted to them in connection with the operation of a criminal justice system, as discussed above. This would entail a substantial increase in the staffing and material resources of each organ.

39. The Procuracy would be called upon - possibly, under article 52 of the draft statute, with the assistance of any State authority concerned as well as any relevant international body including INTERPOL - to investigate the complaint, develop the prosecution brief, conduct the prosecution and make preparations for the trial.

40. The investigation of the complaint would require questioning suspects, victims and witnesses, collecting documentary and other forensic evidence, ensuring that appropriate chains of custody of evidence are maintained, conducting searches, conducting mass grave exhumations where necessary, undertaking local inquiries and coordinating with various national authorities and other investigation agencies.

41. The development of the prosecution brief would involve assessing the relevant material for inclusion in the brief, securing relevant evidence to establish each element of each charge and preparing the brief for the Prosecutor.

42. The conduct of the prosecution would require legal research and the preparation of submissions in relation to trials and appeals before the court, the review of briefs of evidence resulting from the investigation process to establish whether the evidence is sufficient to establish a prima facie case against the accused person(s) and to determine the form and substance of indictments before submission to the Presidency for confirmation.

43. Preparations for trial would include securing the attendance of all witnesses, ensuring that witness-protection measures are in place, ensuring that sufficient witnesses are available to give evidence before the Trial Chamber as the trial progresses and ensuring that witnesses are adequately provided for in terms of accommodation and meals and loss of income.

44. The staff required by the Procuracy to perform those functions would include investigators, legal advisers, forensic experts, laboratory technicians,

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10/ Ibid., para. 3 (c).

prosecutors, interpreters, translators and secretaries. Provision would also have to be made for travel of witnesses, experts and other sources of evidentiary materials to the seat of the court or other places. Regional offices might have to be established and detention facilities would have to be identified. 11/

45. There would be a corresponding need to increase the staff and material resources available to the Trial and Appeals chambers, whose proceedings would require the continuous presence, at the location of the trial, of, respectively, five and seven judges, entitled to a daily allowance (except for the President of the Court, who is to receive an annual allowance). Provision would also have to be made for travel by judges to and from the location of the trial, for the services of consultants and experts in the disciplines of international law, criminal law, human rights law, humanitarian law, etc., and secretarial support.

46. The staff and material resources of the Registry would have to be correspondingly increased. 12/

47. Provision would furthermore have to be made for the financial implications of: (a) the rights of the suspect under article 26 of the International Law Commission draft (right to have free legal representation in case of indigence and right to be provided, when needed, with interpretation and translation services); and (b) the rights of the accused under article 41 (right to free legal representation in case of indigence, right to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution, right to be provided, free of any cost, interpretation and translation services when needed).

48. The precise staffing needs and overall costs of the various organs of the court at this stage of development of the institution would depend on, inter alia:

(a) The characteristics of the case (in terms of, for instance, the number of suspects and the degree of complexity of the investigation process);

(b) The procedures for investigations and judicial proceedings to be defined in the Rules of Court;

(c) The location of the seat of the court and the degree of cooperation of the host country in providing the necessary premises (e.g., courtrooms, office buildings) and detention facilities;

11/ Under the 1994-1995 revised estimates for the International Tribunal for the former Yugoslavia (A/C.5/49/42), the manning table of the Office of the Prosecutor includes 100 posts in the Professional category and above.

12/ Under the 1994-1995 revised estimates for the International Tribunal for the former Yugoslavia, the manning table for the Registry includes 45 posts in the Professional category and above.

(d) The extent to which States would be willing to cooperate in providing the resources and facilities to be used by the Procuracy (e.g., experts, laboratory facilities).

49. It does not seem possible, at this stage, to frame, in relation to these four decisive parameters, realistic assumptions on the basis of which staffing and cost estimates could meaningfully be prepared.

50. The above remarks apply to an even greater degree to the fourth stage of development of the proposed institution, the stage where the States parties to the statute would decide that the court should function on a full-time basis. The staffing and cost estimates for a full-time court may depend to a large extent on the evolution of the institution in practice and the terms of the decisions taken by States parties pursuant to article 10.

51. Also to be taken into consideration in estimating the costs of the establishment and operation of the proposed court are the provisions of the draft statute envisaging the performance by States parties of a number of important functions at various stages, including, in addition to those referred to in paragraphs 11, 20 and 32 above, the approval of the relationship agreement with the United Nations under article 2; the approval of the host country agreement and any special agreement concerning the exercise of the court's powers and functions on the territory of a State other than a State party under articles 2 and 3; the election of judges subsequent to the initial elections (casual vacancies and transitional elections); and the approval of the initial Rules of the Court as well as any additional rules under article 19. The Commission also noted that States parties may need to meet periodically to consider financial or administrative matters, such as the proposed budget or periodic reports of the court, and to consider amendment and review of the statute at the request of a specified number of States parties. As indicated in article 19 concerning the Rules of the Court, there are various ways in which States parties could perform the functions in question, for example by convening a conference or a meeting of States parties or by submitting their views in writing. The Commission recognized that the means by which the States parties would act together would need to be addressed in the treaty accompanying the statute of the court.

IV. CONCLUSION

52. As indicated above, preliminary staffing and cost estimates relating to the first and second stages of development of the proposed institution could be provided on the basis of specific assumptions, which the Secretary-General is ready to put forward subject to the agreement of the Ad Hoc Committee. The third and fourth stages, on the other hand, involve such a large number of unknown variables that the Secretary-General does not find it possible to develop a realistic set of assumptions on the basis of which estimates could be prepared. The Secretary-General would, of course, be ready to re-examine the question in the light of the guidance he might receive from the Ad Hoc Committee.